STATE OF MICHIGAN

IN THE SUPREME COURT

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC,

Petitioner-Appellant,

vs

TOWNSHIP OF MARION,

Respondent-Appellee.
_____/

Supreme Court No. 130698

Court of Appeals No. 262437

Michigan Tax Tribunal No. 307906

AMICUS CURIAE BRIEF OF

THE MICHIGAN CHAMBER OF COMMERCE

130698

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QUESTION PRESENTED

Whether a Property Owner subject to special assessment for a planned improvement may seek relief when there is a subsequent change to the plan that materially affects the benefit to the owner's property?

Petitioner-Appellant Highland-Howell Development Company, LLC answers: "Yes"

Respondent-Appellee Township of Marion answers: "No"

Michigan Court of Appeals answers: "No"

Michigan Tax Tribunal answers: "No"

Michigan Chamber of Commerce answers: "Yes"

I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Chamber of Commerce (the "Chamber") is a non-profit membership corporation that represents the interests and views of its over 7,000 members, who are private Michigan corporations and businesses engaged in civic, professional, commercial, industrial, agricultural, and recreational enterprises. Many of the Chamber's members are developers, like Petitioner-Appellant Highland-Howell Development Company, LLC ("Highland"). All of the Chamber's members are impacted by judicial and legislative decisions that affect development within the State, jobs and the overall economy.

There is no dispute that Respondent-Appellee Marion Township (the "Township") substantially and substantively changed the plans for the special assessment at issue in this case in a manner that materially affected the property owner Highland seven years after the special assessment was levied. Indeed, the primary benefit to Highland from the intended sewer line was eliminated, yet Highland not only was required to pay the full $3.25 million originally assessed, it was provided no opportunity to object, be heard or appeal this unilateral and belated decision by the Township. Under the decisions of the Court of Appeals and Michigan Tax Tribunal ("MTT"), a township thus may lawfully decide to materially change a public improvement project's design plan years following issuance of the public notice, hearings and confirmation of the special assessment roll – without any need to provide the affected property owners with any due process. The question accordingly before this Court is whether the Court of Appeals and MTT decisions, which permit the Township to eliminate the benefit for which a property owner is assessed yet still be required to pay, without offering the affected property owners any opportunity for relief, could possibly be consistent with the applicable statutory schemes and settled concepts of procedural and substantive due process. The answer to this question is absolutely and unequivocally "no" and these decisions must be reversed.

The issue currently before this Court is an important one for Michigan businesses and all property owners who are or may be specially assessed. The State has more than 1000 townships (as well as other municipalities, including cities, villages and counties, under other similar statutes), all of whom routinely levy special assessments for public improvements. Indeed, the Special Assessment Act, MCL 41.721, *et. seq.* (the "Act"), expressly authorizes townships to levy assessments for at least 15 types of public projects, including storm and sanitary sewers, water systems, public roads, public parks, elevated structures for foot travel, disposal of garbage and rubbish, bicycle paths, erosion control structures or dikes, trees, lighting systems, sidewalks, aquatic weeds and plants, private roads, lakes, ponds, rivers, streams, lagoons or other bodies of water, dams, sound attenuation walls, and sound mitigation treatments. Special assessments are not only varied in their nature, but can be quite expensive. In this case, Highland alone was assessed approximately $3.2 million for a sewer line that was supposed to traverse its property, despite the fact that the nature of the "improvement" was materially changed to Highland's significant detriment 7 years into the assessment's term.

Unless reversed, the Court of Appeals and MTT decisions will leave property owners without any remedy to challenge a township's post-levy actions, even if they are so egregious as to wholly negate the benefit for which the special assessment was originally levied. Such a result is not only constitutionally infirm, its implications are broad and far reaching, many of which may not be fully appreciated for years to come. The Court of Appeals and MTT decisions essentially give municipalities the unfettered discretion to impose substantial costs on developers, in particular, but in reality all property owners, for a benefit they may not actually receive but still have to pay for. Developers will obviously be highly circumspect before embarking upon projects that impose such a significant and potentially disastrous economic risk,

when absolutely no recourse is available and the municipalities have apparent unbridled authority, without even time constraints, in this regard. These rulings could impact developers in many respects, including obviously the costs of development, difficulty in obtaining necessary lending due to extreme uncertainty (for a significant length of time) as to total costs, probable delays and attendant costs associated therefrom, insurance issues, and possibly just the unwillingness of developers to do business in Michigan or, at a minimum, within certain areas known to be problematic. These decisions would most certainly trickle downward, as well, affecting jobs in the construction, lending, and other industries, possibly impacting the ability of communities to have necessary homes and businesses developed, and the general state economy.

As detailed in Highland's Application for Leave to Appeal, the facts and law of this case clearly dictate that the Court of Appeals and MTT decisions must be reversed. The Chamber will not simply reargue Highland's case, which has already been well argued to this Court, but merely add its own views and points of emphasis in the hope of providing the Court a full perspective on the importance of this case and in response to the invitation to do so provided by the Court in its June 30, 2006 Order.

II. STATEMENT OF FACTS

The Chamber relies upon the factual background contained in Highland's Application for Leave to Appeal.

III. ARGUMENT

A. PROPERTY OWNERS SUBJECT TO A SPECIAL ASSESSMENT ARE ENTITLED BY STATUTE AND DUE PROCESS TO NOTICE, OPPORTUNITY TO OBJECT AND REVIEW OF CHANGES MADE TO THE PLAN THAT MATERIALLY AFFECT THE BENEFIT RECEIVED.

This Court has posed three questions to the parties, the first of which will be addressed by the Chamber in this brief,[1] and is as follows:

> the manner in which a property owner subject to special assessment for a planned improvement may seek relief when there is a subsequent change to the plan that materially affects the benefit to the owner's property.

June 30, 2006 Order.

A special assessment is a levy upon property within a specified district. *Kadzban v City of Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993). Although it resembles a tax, a special assessment is not a tax. *Id., citing Knott v City of Flint*, 363 Mich 483, 497; 109 NW2d 908 (1961). In contrast to a tax, a special assessment is imposed to defray the cost of a specific local improvement, rather than to raise revenue for general governmental purposes. As this Court explained in *Knott*:

> There is a clear distinction between what are termed general taxes and special assessments. The former are burdens imposed generally upon property owners for governmental purposes without regard to any special benefit which will inure to the taxpayers. The latter are sustained upon the theory that the value of the property in the special assessment district is enhanced by the improvement for which the assessment is made.

Id. at 499, *citing In re Petition of Auditor General*, 226 Mich 170, 173; 197 NW 552 (1924).

A special assessment can thus be seen as remunerative; it is a specific levy designed to recover local and peculiar benefits upon property within a defined area. *Kadzban*, 442 Mich at

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[1] With respect to questions 2 and 3 posed by this Court in its June 30, 2006 Order, the Chamber concurs with Highland's supplemental filing on these issues.

500. Street and utility improvements are common bases for special assessments, as are the costs of paving a road or installing a sewer system, as is the case here. *Id.* at 500-01. But not every "improvement" benefits the abutting property, and in such instances this Court has actually invalidated a special assessment, concluding that the assessed property received no special benefit in addition to the very benefit that was conferred on a community as a whole. *Id.; see also Fluckey v Plymouth*, 358 Mich 447; 100 NW2d 486 (1960); *Brill v Grand Rapids,* 383 Mich 216; 174 NW2d 832 (1970).

In *Dixon Road Group v Novi*, 426 Mich 390, 400; 395 NW2d 211 (1986), this Court held that special assessments are permissible only when the improvements result in an increase to the value of the land specially assessed, and that municipalities may not levy special assessments without regard for the amount of benefit that inures to the assessed property. For a special assessment to be valid, "there must be some proportionality between the amount of the special assessment and the benefits derived therefrom." *Id.* at 401. In the absence of such a relationship, the special assessment would be "akin to the taking of property without due process of law." *Id.* at 403. "Such a result would defy reason and justice." *Id.*

As explained by the Court of Appeals in *Trussell v Decker*, 147 Mich App 312; 382 NW2d 778 (1985), these due process requirements require full disclosure in the notice provided to property owners concerning such assessments. The Trussell Court in fact concluded that the notice that had been given to the property owners denied their due process and was thus legally insufficient. "Not only must the notice comply with the requirements of the statute, it must not be worded in such a way that it precludes the people affected from discovering or exercising other rights that they may have under other applicable statutes." *Id.* at 325.

In sum, special assessments are statutorily authorized only when the amount is proportional to the benefit received by the affected property owners for the "improvement." By statute and settled principles of due process, property owners are entitled to notice, opportunities to be heard and object and to review, if necessary, of special assessments that affect their property and pocket book. A disregard of these basic protections, as was done by the Township here, is a clear taking of property without due process of law and is directly offensive to the Constitution.

1. The Express Statutory Directives of the Act were Blatantly Disregarded by the Township.

Highland was never afforded the opportunity to object and/or appeal a material change to the benefit it was supposed to receive as a result of the substantial special assessment at issue, which was a clear violation of its rights under both substantive and procedural due process as well as the controlling statutory scheme. The Chamber does not submit that the Act itself is unconstitutional but, rather, that the Township's complete disregard for the procedural requirements and protections afforded under the Act was unfair, inequitable, unconstitutional and simply violative of the law.

The Act authorizes townships to make public improvements, to provide for the payment of the improvement by the issuance of bonds, and to defray the whole or part of the cost of the improvement by special assessments against the property especially benefited by the improvements. MCL 41.721. A variety of public improvements can be made pursuant to the Act, including the "construction, improvement and maintenance of storm or sanitary sewers." MCL 41.722(1)(a).

Per the Act, a township is statutorily obligated to follow certain procedures before it may impose a special assessment, which can be, as in this instance, quite substantial, totaling literally

millions of dollars for a single property owner. The statutory procedure mandates preparation of plans for the proposed improvement, which must be filed with the township clerk, MCL 41.724(1), designation of the assessment district, *id.*, and, following proper notice, a public hearing on any objections to the proposed improvements and the assessment district. MCL 41.724(2). Thereafter, the township can approve the project, the plans (including any changes to the plans), the cost and the special assessment district. MCL 41.725(1)(a)-(b), (d). The township supervisor must then prepare a special assessment roll and place it on file for public review, and the total amount of the assessment must be proportionately allocated to the benefit of the affected properties. MCL 41.725(1)(d), MCL 41.726(1).

The township is then required to again provide proper notice to the affected property owners and to hold a second public hearing on any objections, following which the township may confirm the assessment roll. MCL 41.726(1) and (2). Any party who may have objected to the assessment has 30 days (now 35) in which to appeal to the MTT. MCL 205.735(3).

The Act must be read to prohibit subsequent material changes to the plans unless affected property owners are provided with notice, an opportunity to object and be heard as well as appeal, if necessary. Throughout the Act is a specific procedure that the Township was required to follow and which is clearly intended to inform potentially affected property owners of the nature of the improvement, the amount of the assessment and an opportunity to object and appeal. MCL 41.724(1)-(2), MCL 41.725(1)(d), MCL 41.726(1)-(3). The Act's numerous procedural requirements are clearly designed to protect the due process rights of property owners who not only will be affected by the changes to the improvement itself but required to pay for said improvement.

Because these statutory requirements ensure basic due process protections, the Legislature chose to make the procedures mandatory, and thus the Township had no discretion with respect to whether to fully comply. Indeed, the Act is replete with express mandatory directives. *See, e.g.,* MCL 41.724(2) (The notice of public hearing required of the township to hear objections "**shall** state that the plans and estimates are on file with the township clerk for public examination and **shall** contain a description of the proposed special assessment district.") (emphasis added); MCL 41.725(1)(a)-(d) (After the public hearing is held, and if the township board desires to proceed with the improvement, the township board "**shall** approve or determine by resolution: (1) the completion of the improvement, (2) the plans and estimate of the cost as originally presented or as revised, corrected, amended or changed, (3) the sufficiency of any required petition, and (4) the special assessment district, including the term of the district's existence.) (emphasis added); MCL 41.725(1)(d) (The amount assessed against each parcel "**shall** be the relative portion of the whole sum to be levied against all parcels of land in the special assessment district.") (emphasis added).

The Act even includes a mandatory provision concerning the manner in which a township must handle special assessments found invalid as a consequence of irregularities or informalities in the proceedings, or if a court of competent jurisdiction determines the assessment is illegal, as follows:

> [T]he township board shall, whether the improvement has been made or not, whether any part of the assessment has been paid or not, have the power to proceed from the last step at which the proceedings were legal and cause a new assessment to be made for the same purpose for which the former assessment was made. All proceedings on such reassessment and for the collection thereof shall be conducted in the same manner as provided for the original amount, and whenever an assessment or any part thereof levied upon any premises has been so set aside, if the same has been paid

and not refunded, the payment so made shall be applied upon the reassessment.

MCL 41.733.

The term "**shall**" contained through the Act obviously imposes mandatory obligations on townships, as is recognized by well settled principles of statutory construction. *See, e.g., Policemen and Firemen Retirement System v Detroit*, 270 Mich App 74, 80; 714 NW2d 658 (2006) (word "shall" is unambiguous and is used to denote mandatory, rather than discretionary, action); *Kircher v Ypsilanti,* 269 Mich App 224, 228; 712 NW2d 738 (2005) (use of the word "**shall**" in a statute or ordinance unambiguously mandates an action).

Per basic rules of statutory construction, the Act itself thus statutorily obligated the Township to follow certain procedures before it could impose a special assessment, or make material modifications to a special assessment, which procedure was indisputably not followed here. To construe these statutory provisions as somehow authorizing the Township to make a material change to the plans after the time for objecting and appeals have lapsed would constitute a clear violation of the Act's mandates and cannot possibly be correct, must less constitutional. Rather it is more logical and consistent with established rules of statutory construction to simply conclude that the Township was statutorily required to fully notify the affected property owners of a material change to the plan that affected the benefit they would receive and therefore provide the opportunity for such property owners to be heard and appeal. This was unequivocally not done by the Township in this instance. By failing to follow this procedure, the special assessment at issue is simply void.

Indeed, to accept the Township's position here would effectively render the Act's procedural requirements utterly meaningless, because the Township could change the plans at any time following confirmation of the specified assessment roll without any recourse by the

affected property owners, because the supposed appeal period would have lapsed. This interpretation easily violates the due process clause and should be flatly rejected, as it was by the MTT, the agency with expertise in areas of taxation and property assessments. Specifically, the MTT concluded in its Opinion as follows:

> [T]here is no express statutory authority to change the plans in the manner that Respondent did in this case.. . . The . . . language [of the Act] does not authorize a township to make unlimited changes to the approved plans, the estimate of cost, or to the district, at any time, without limitation. This language must be read together with the rest of the subsection and the entire act. The previous sentence [in MCL 41.724(3)] requires the board to hear objections at a public hearing or at an adjournment of the hearing. This strongly implies that the board may revise, correct, amend, or change the plans at the hearing or at an adjournment of the hearing only. Furthermore, MCL 41.725 describes the next step in the process. After the hearing on objections, the board must adopt a resolution to approve or confirm 'the *plans*. . . as presented or as revised, corrected, amended, or changed.' MCL 41.725(b) [emphasis added.] The statutory reference to 'revised, corrected, amended, or changed' in section 725(b) encompasses the same substance as section 724(3), which allows the board to '. . . revise, correct, amend, or change the plans. . .' at the hearing, or an adjournment of the hearing. Therefore, during or after the hearing required under section 724, the board may change the plans, but under section 725 the board must finally approve the plans by resolution, with any changes made since the time of the hearing.
>
> The statute requires that changes to the plan must be made *before* the resolution is adopted to approve the plans.

Highland-Howell Dev Co v Marion Twp, MTT Docket no. 261431, pp 22-23 (emphasis in original).

To be consistent with due process, the Act must be read to require the Township to provide the affected property owners with notice, opportunity to be heard and for review. Statutes are presumed to be constitutional unless their unconstitutionality is clearly apparent. *City of Owosso v Pouillon*, 254 Mich App 210, 213; 657 NW2d 538 (2002). Statutes must be construed as proper under the Constitution if possible. *Id.; see also Wayne County Treasurer v*

Westhaven Manor Limited Divided Housing Ass'n, 265 Mich App 285, 295; 698 NW2d 879 (2005) (statutes are presumed to be constitutional and should be construed in such a manner if at all possible).

In the instant case, the Act can clearly be interpreted to require the Township to follow its mandatory directives and thus provide the constitutionally required protection to affected property owners. Indeed, the Act must be read in this manner to be constitutional.

2. The Tax Tribunal Had Jurisdiction to Review Highland's Appeal.

The Michigan Court of Appeals and MTT erroneously concluded that the MTT did not have jurisdiction to hear Highland's objections to the Township's special assessment, primarily because Highland did not appeal the Township's initial 1996 decision in this regard, prior to Highland having any complaint. Thus, per the Court of Appeals and MTT, Highland was apparently supposed to anticipate the Township's subsequent decision to materially alter the proposed improvement and corresponding benefit to its property and its failure or inability to somehow predict this action permanently insulated the Township's later decisions from review. This is nonsense.

The Tax Tribunal Act clearly provides for review in this instance. *See* MCL 205.731(a) (The MTT has "exclusive and original jurisdiction" over "[a] proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to. . . special assessments. . . under property tax laws."). The Township's unilateral decision to *ex post facto* alter the plans formally approved per the Act to significantly reduce the benefit received by the affected property owners is a decision "relating to. . . special assessments. . . under property tax laws." MCL 205.731(a).

The MTT was not barred from hearing this case simply because Highland failed to appeal the initial assessment in 1996, an assessment to which it had agreed. And Highland did timely appeal the Township's only formal decision to modify the plans to Highland's detriment 7 years later. The MTT thus most certainly had the power to grant relief if it found the Township's decisions improper. MCL 205.732(a), (b) and (c). To construe the Tax Tribunal Act otherwise is inconsistent with a plain reading of the statute and with fundamental and basic protections provided by the due process clause.

3. Highland has been Unconstitutionally Denied its Due Process Rights by Being Denied the Right to Object and Appeal the Special Assessment.

In *Dow v State of Michigan*, 396 Mich 192; 240 NW2d 450 (1976), this Court concluded that a hearing of some sort is undeniably required by the due process clauses of both the United States and Michigan Constitutions before the government may impose an assessment or collect taxes:

> It [is] unquestioned that the owner of real property is entitled to claim the protection of the due process clause in respect to the assessment and collection of taxes. * * * While the form and nature of the hearing can vary, the due process clause secures an absolute right to an opportunity for a meaningful hearing.

Id. at 203-05. Notice and a predeprivation opportunity to be heard are fundamental to due process. "The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v Erickson*, 522 US 262, 266 (1998); *see also Nelson v Adams USA, Inc*, 529 US 460, 466 (2000) ("the opportunity to respond [is] fundamental to due process"); *Dusenbery v United States*, 534 US 161, 167 (2002) ("individuals whose property interests are at stake are entitled to 'notice and then an opportunity to be heard'").

In *Alan v Wayne County*, 388 Mich 210; 200 NW2d 628 (1972), this Court explained the necessity of a municipality providing full explanatory notice, as follows:

> Where public officials are acting under a constitutional and statutory duty to give notice to the public of what the government proposes, and especially where it concerns rights of electors respecting important undertakings of government such as the issuance of bonds secured by taxing powers, then the government and its public officials, in the exercise of the duty of informing, occupy a position of trust and a fiduciary standard should be applied to them.
>
> In giving notice to taxpayer regarding public securities, to comport with due process the notice must be phrased with the general legal sophistication of its beneficiaries in mind. As phrased it must not make any misleading or untrue statement; or fail to explain, or omit any fact which would be important to the taxpayer or elector in deciding to exercise his right. *In short, the notice may not be misleading under all the circumstances.*

Id. at 352-53 (citations omitted) (emphasis added).

The concept of due process, both substantive and procedural, has long been deemed applicable in the context of special assessments, as in other assessment situations which constitute a taking of property. As explained by Justice Levin in a dissenting opinion in *Szymanski v Westland*, 420 Mich 301; 362 NW2d 224 (1984):

> Due process is a flexible concept. The timing and content of required notice depend on appropriate accommodation of the competing interests involved. Because special assessments are, as the term implies, exceptional, a high standard of notice is required. The notice should fairly apprise the property owner of readily available information that might influence his decision whether to contest the assessment. Here although the city had available cost estimates on a frontage basis, the notices did not inform the plaintiffs of the estimated amounts of the proposed special assessments. Property owners who might have been energized to act had they known of the amounts of the potential liabilities, may have ignored the somewhat uninformative letter they received.

Id. at 306 (citations omitted).

Here, Highland was given absolutely no notice that the plans would be changed or that such changes would dramatically alter the "benefit" it would receive from the "improvement." Highland's due process rights were thus clearly and unequivocally violated. Indeed, this case is

perfectly illustrative as to why due process requirements are included by the Legislature within statutory assessment schemes such as the Act. The Township here levied a $3.2 million assessment in 1996 for a sewer improvement project in which the sewer was to traverse Highland's property. More than 7 years later, the Township passed a resolution altering the design such that the sewer would no longer traverse the property, yet the property somehow remained assessed at $3.2 million and such change is amazingly deemed insulated from objection or review. This result could not possibly be intended by the Legislature, is most certainly inconsistent with the procedures of the Act, and is a clear violation of the substantive and procedural due process rights to which Highland is unequivocally entitled.

The decisions by the Court of Appeals and MTT upholding the Township's conduct in this regard are not only unconstitutional but have far reaching and serious implications and must be reversed. The Act must be interpreted to require a meaningful opportunity for an affected property owner to challenge a change in a special assessment project plan that materially reduces the benefit to the owner's property. Such a construction of the Act is not only constitutionally compelled, to hold otherwise would be unbelievably inequitable, unjust and simply unfair. A property owner has to be able to rely on officially adopted plans for a particular improvement when that owner is required to pay for a special assessment for that improvement. Without that certainty, besides being constitutionally infirm and offensive to basic considerations of fairness and equity, the obvious implications and consequences are contrary to law and public policy.

If the Township's decision to materially change the plans for a public improvement resulting in a significantly reduced benefit to the affected property holders is deemed insulated from review, the Act is rendered meaningless, as it can no longer ensure that the proportionally required by the due process clause remains. Apparently, according to the Court of Appeals and

MTT, Highland's only recourse was to challenge the original assessment before any act took place to which it objected and, thus, before it even had a claim. These holdings by the Court of Appeals and MTT are nonsensical, eviscerate the Act, and will likely be applied as precedent by other municipalities for similar assessments, thus making a mockery of the due process clause.

Moreover, the decisions of the MTT and Court of Appeals affirming the Township's blatant disregard for the statutory and due process rights of Highland, ignore settled law and permit and encourage townships and municipalities to mislead property owners into agreeing to pay for something they may very well never receive. Such a conclusion is absurd and legally offensive. It would be practically impossible for property developers and lenders to make decisions concerning any developments, particularly those of size, without any certainty in this regard. The entire process would be more difficult and significantly more expensive and risky. It may be difficult to obtain loans or even insurance and this effect would ripple down to architects, construction companies, etc., thereby effecting jobs, small and large businesses and the general economy.

Moreover, the MTT docket is going to be most certainly overwhelmed when every single special assessment is challenged regardless of whether there is actually a complaint, for fear that the affected property owner will lose its rights in this regard should the Township choose to make changes at a later date. Most significantly, however, is the fact that these holdings are simply offensive to even basic concepts of fairness and equity and are chilling to fundamental and settled constitutional protections to which every property owner in the State is entitled.

IV. CONCLUSION

Accordingly, for the reasons set forth above, the Chamber submits that the decisions of the MTT and Court of Appeals must be reversed.

Respectfully submitted,

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